

## **REMARKS**

### **I. Introduction**

Claims 1, 4, 8, 10 and 13 are presently pending and finally rejected. Following entry of the present amendment, claim 1 has been amended to clarify the Applicants' invention. It is believed no new matter has been added.

### **II. 35 USC § 103 rejections**

A. Claims 1, 4, and 10 are rejected under 35 USC 103(a) as being unpatentable over Duffett (WO 98/13133) in view of Itagaki et al. (EP 0564787).

Applicants respectfully submit that a prima facie case of obviousness has not been established over the claims as presently amended, and request the rejection be withdrawn.

The present invention is directed to a non-gelling gelatin substitute product. The composition is essentially vegetable fat of at least 99 weight % cocoa butter deodorized to an extent of 90-95%, and is in the form of a powder.

Duffett discloses a method for producing crystals of fat. A substance (solid at room temperature) is obtained in liquid form. The liquid is atomized, and the atomized liquid is rapidly cooled so that at least partially solid particles are formed. One aspect of Duffett is a method of making chocolate. Cocoa butter or cocoa mass is obtained in liquid form, atomized, and the atomized liquid is rapidly cooled to form a powder, which is added during the chocolate making process as part of the crumb making process or at the conching/tempering stage of chocolate production. Pages 12 – 13. Duffett does not teach or suggest any vegetable fat composition having at least 99% weight cocoa butter.

Itagaki et al. discloses confectionary fat compositions comprising from 20 to 80% by weight of a deodorized cocoa butter and from 20 to 80% by weight of hardened fats. Such compositions are suitable for sandwiching or filling in biscuits, cakes and bread, which is excellent in flavor, melting properties, texture, shape retention at ordinary temperature and whipping properties, has a sharp meltability in the mouth. Itagaki emphasizes the unsuitability of cocoa butter alone for these purposes, and the compositions disclosed additionally require the presence of 20 - 80% hardened fat with a melting point of 45°C or lower.

*There is no reasonable expectation of success or motivation in practicing the claimed invention based on the disclosure of Itagaki et al. and Duffett.*

A prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. *W.L. Gore & Assoc. Inc. v. Garlock, Inc.*, 721 F.2d 1540 (Fed. Cir 1983).

The Examiner finds deodorized cocoa butter as taught by Itagaki et al does not have a strong flavor, and thus can be advantageously incorporated into food products of various flavors. However, Itagaki et al. discloses cocoa butter needs to be tempered, but fat compositions which are tempered can hardly be whipped because of the fat crystal content. Page 2, lines 11 – 19. Accordingly, Itagaki solves this problem by incorporating 20 to 80% by weight of a hardened fat into the compositions. Based on a fair reading of Itagaki, one of skill in the art would not be motivated to produce a composition having 99% cocoa butter, as such compositions are clearly unsuitable for uses contemplated by Itagaki. Applicants respectfully submit that Itagaki actually teaches away from the present invention by incorporating 20 – 80% hardened fat into the compositions, as the incorporation of such hardened fats results in, at most, compositions containing 80% cocoa butter.

The Examiner finds it would have been obvious to one of skill in the art to modify Duffett and use the deodorized cocoa butter of Itagaki to make the powder form. However, Duffett only discloses powder cocoa butter is used as part of the crumb making process or at the conching/tempering stage of chocolate production. Applicants respectfully submit one of skill in the art would not seek to eliminate cocoa butter flavor, i.e., a chocolate flavor, when manufacturing chocolate.

The Examiner also finds one of skill in the art would have been motivated to modify Duffett at least for the purpose of removing the undesirable cocoa butter flavor and making the fat based powdered product more versatile and usable in foods with other flavors as taught by Itagaki et al. However, the object of Itagaki is to provide a confectionary fat composition containing cocoa butter which are excellent in shape retention at ordinary temperature and whipping properties. It is submitted that the powder of Duffett would not have shape retention. Additionally, whipping a powder consisting of cocoa butter is contrary to the teachings of Itagaki, which requires the presence of 20% to 80% hardened fat. Applicants respectfully submit

the powdered cocoa butter of Duffett cannot be used as a filling for the foods as described in Itagaki et al.

Finally, the teachings of Itagaki and Duffett cannot be combined. "If proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification." *In re Gordon*, 733 F.2d 900 (Fed. Cir. 1984).

Itagaki discloses cocoa butter needs to be tempered, but fat compositions which are tempered can be hardly whipped because of the fat crystal content. Page 2, lines 11 – 19. Accordingly, Itagaki produces fat compositions without tempering to avoid the formation of crystals, i.e., by adding a hardened fat to cocoa butter. In contrast, Duffett discloses methods of producing crystals of fat. Page 1, lines 14 – 17. Applicants respectfully submit that the references cannot be combined, as Itagaki et al. seeks to avoid forming fat crystals, while Duffett produces fat crystals, nor would one of skill in the art combine the teachings of the two.

Claims 4 and 10 all depend from claim 1. As neither Duffett or Itagaki et al. teach or suggest all of the limitations of claim 1, it is submitted the rejection of claims 4 and 10 are improper, and Applicants request the rejection be withdrawn.

B. Claims 8 and 13 are rejected under 35 USC 103(a) as being unpatentable over Duffett (WO 98/13133) in view of Itagaki et al. (EP 0564787), and further in view of Kawabata et al. (US 5,460,847)

Applicants respectfully request the rejection be withdrawn, as claims 8 and 13 depend from claim 1. As previously discussed, Duffett and Itagaki et al. fail to teach or suggest all of the limitations of claim 1, and Kawabata fails to cure such defects. Applicants request the rejection be withdrawn.

## **V. Summary**

Applicants have made a *bona fide* attempt to address all matters raised by the Examiner. Applicants respectfully submit that the application is now in condition for allowance, and therefore respectfully request that the outstanding rejections be withdrawn and that a Notice of Allowance be issued. If any remaining matters need to be resolved, Applicants respectfully request an interview with the Examiner prior to any official action being taken by the Office in

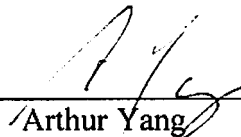
response to these arguments and amendments in order to facilitate allowance of the pending claims.

It is believed no fee, other than the Request for Continued Examination and extension of time, is presently required. If a fee is required, please charge the same to Deposit Account 50-4255.

Respectfully submitted,

Date: 9 Nov 2009

By

  
\_\_\_\_\_  
Arthur Yang  
Reg. No. 45,721  
HOXIE & ASSOCIATES LLC  
75 Main Street Suite 301  
Millburn, NJ 07041  
(973) 912-5232